

* **HIGH COURT OF DELHI : NEW DELHI**

+ **IA No. 3806/2008 in OMP No. 452/2005**

% Judgment reserved on : 25th February, 2009

Judgment pronounced on : 1st July, 2009

National Highway Authority of India Petitioner
Through : Ms. Padma Priya, Adv.

Versus

M/s Youone Maharia (JV) Respondent
Through : Mr. Naushad Ahmed Khan, Adv. with
Ms. Bhakti, Adv.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MANMOHAN SINGH, J.

1. The present application has been filed by the applicant M/s Quippo Infrastructure and Equipment Ltd. who is not a party in the OMP seeking modification or variation of the order dated 23rd March, 2006 passed by this court in OMP No. 452/2005 whereby the OMP was disposed of directing status quo to be maintained as regards the possession of the equipment and machinery detailed in Annexure 'C' and 'C1' of the petition till the arbitration proceedings are disposed of by the arbitral tribunal.

2. By the order it is also left open to the parties to seek

modification of the abovesaid interim order, by an application before the arbitral tribunal.

3. The applicant in the present application has prayed for directions for release of equipments or machineries of the applicant allegedly being withheld unlawfully by the NHAI (National Highway Authority of India), the petitioner herein.

4. The present main petition was filed by the petitioner, NHAI against the respondent M/s. You-one Maharia J.V. under Section 9 of the Arbitration and Conciliation Act, 1996 seeking that a receiver be appointed in respect of equipment and machinery detailed in annexure C and C-1 of the petition. The respondent, by virtue of agreement dated May 23, 2001 (hereinafter referred to as the 'contract') was awarded work of 4/6 laning and upgrading of existing 2 lanes road in the State of Andhra Pradesh from Km. 49.00 (Champavati River) to Km. 97 (Srikakulam) Section of NH-5 of Kolkota-Chennai Corridor.

5. The matter was disposed of vide order dated 23.3.2006 wherein it was directed that status quo be maintained regarding possession of the said equipment and machinery. The present application has been filed after final disposal of the matter.

6. The applicant in the present application has also filed OMP No.555/2006 against the petitioner and respondent herein NHAI under Section 9 of the Act seeking inter alia release of the machinery allegedly belonging to the applicant and brought on site by the contractor on hire from the applicant, which had been retained by petitioner pursuant to

clause 63.1(4) of the contract.

7. The said OMP No. 555/2006 petition was disposed of vide order dated 4.7.2007 on the ground that since there was no arbitration clause between the applicant and NHAI, therefore a petition under Section 9 was not maintainable. However, liberty was given to the applicant to either approach the court or the arbitrator for variation of the status quo order dated 23.3.2006.

8. It is not in dispute that arbitration between NHAI and You One Maharia is pending before an arbitral tribunal and the pleadings are complete and the matter is at the stage of cross examination of the contractor's (claimant's) witness.

9. The present application under consideration being IA No.3806/2008 has been filed by the applicant pursuant to the order dated 4.7.2007 passed by this court in OMP No.555/2007.

10. The case of the applicant is that the equipments worth Rs. 1.3 crores belonging to it and owned by it were illegally and arbitrarily withheld/detained by NHAI (petitioner herein). It is alleged by the applicant that it is suffering monthly loss of Rs. 5.50 lakhs on account of loss on the rent from the same and till date has lost more than Rs. 3 crores in terms of rentals since 2004.

11. The respondent had entered into two separate agreements dated 7th February, 2004 and 26th June, 2004 with the applicant for taking certain construction machineries or equipments with manpower on rent from the applicant for use at above said site. The said

equipment/machinery owned by the applicant and provided on rent are as follows:-

- i) Wheel loader, registration no. HR55 B-6303
- ii) Motor Grader, registration no. AP-31S-6410
- iii) Ingeroll Rand, Vibratory Compactor, registration no. HR-38H-4768.

12. As per the terms of the aforesaid rent agreement between the applicant and the respondent, the applicant provided the above mentioned equipments/machineries on rent to the respondent. However, the custody, possession and/or the title in the said equipments was never transferred and/or passed to the respondent. On the contrary, the same always remained with the applicant only.

13. In accordance with the agreement, the applicant was to operate the said equipments at site and for that purposes was to provide equipment operator's also. Accordingly, the "right to use" including the obligation for "repair and maintenance" as well as "insurance" of the said equipments was of the applicant herein. No interest of any nature whatsoever much less ownership and/or possessory rights were ever transferred to the respondent. As per the terms and conditions of the said agreement dated 7th February, 2004 and 26th June, 2004 which was for a period of seven months, the respondent was only to provide accommodation for the safe parking and storage of the equipment at site.

14. The respondent defaulted in paying monthly rent in respect of the said equipments at the agreed rate and as specified in the agreement.

15. The petitioner authority has made advances amounting to 5% of the total contract price of Rs.1,26,23,80,100/- to the respondent. The respondent duly purchased the equipment and machinery from the aforesaid equipment advance provided to it by the petitioner. The respondent commenced the mobilization of the work sometime in the year 2001 and thereafter stopped the work and failed to complete the same despite several reminders sent to the respondent to expedite the execution of the contract. In view of the respondent's failure to complete the work, the petitioner vide its letter dated 21.12.2004 terminated the contract.

16. Certain disputes arose between the respondent and NHAI in September, 2004 and the contract between them was terminated by the NHAI on 21.12.2004. Upon termination of the said contract, the NHAI seized all the equipments of respondent lying at the site, including the equipments/machineries in question belonging to the applicant herein.

17. The NHAI refused to release the same to the rightful owner(s)/Applicant thereof despite numerous letters/representation by the applicant. It is submitted that the respondent expressed its total inability to secure release of the applicant's equipments from the site.

18. It is submitted that the respondent has also failed to pay the monthly rentals in respect of the agreement in question. As on date, the respondent No.1 is in default and arrears of rentals to the tune of Rs.2 crores(Approx.). The arbitration proceedings between the applicant and the respondent in this regard is pending before the sole arbitrator.

19. The petitioner opposed the present application on the ground that there should be a valid arbitration agreement existing between the parties to the dispute. It is submitted that it is an admitted case that there is no agreement much less an arbitration agreement between the applicant herein and the NHAI.

20. The order dated 23rd March, 2006 further records that only the parties to the subject OMP may move the arbitral tribunal to seek modification of the said order. The present application is thus liable to be dismissed on the limited grounds that the applicant is neither a party to the subject OMP nor to the contract between the respondent and the petitioner and as such the matter stands disposed of, and the issue of modification of the aforesaid order, if any is to be decided by the arbitral tribunal alone.

21. It is further contented by the petitioner as the applicant is not the party to the arbitration agreement, therefore not entitled for any relief and the application filed by the applicant is not maintainable.

22. In this regard reference is made to the case of **First International Line S.A. Panama v. Chokhani International Ltd.;** **2003 (3) Arb. LR 225 (Madras) (DB)** wherein it was observed that:-

“Once the first respondent comes out with the clearest possible stand that it had its claim only against the second respondent and once there is an agreement of arbitration between the first respondent and the second respondent, the appellant would be a total stranger to the affairs even if the appellant is the owner of the vessels.”

23. He also referred to the case of **National Highways Authority of India v. China Coal Construction Group Corpn. – AIR 2006 Delhi 134**, whereby a similar issue was decided by this Court and it was held that:-

“.....it becomes clear that the intervener has no privity of contract with NHAI. It is also clear that the intervener is not a party to the arbitration proceedings. Section 9 of the Act is with reference to arbitral proceedings just as the intervener cannot be a party in the arbitral proceedings pending between NHAI and China Coal, it has no locus standi in the present proceedings. The interim orders that may be passed under Section 9 or Section 17 are with respect to the parties to the arbitration and in connection with the subject matter thereof. As such, the intervener’s application under Order 1 Rule 10 cannot be allowed.....”

24. It is further alleged that Clause 54.1 of the contract provides that the petitioner shall have all right, title and interest over the plant and equipment provided by the respondent at the site of the works and shall be deemed to be exclusively intended for the execution of the works.

25. Clause 63.1(4) of the contract envisages that in case of any dispute arising between the petitioner and the respondent during the currency of the contract, the petitioner may take symbolic possession of the plant and equipments at the site of the respondent.

26. In exercise of its powers under the aforesaid clauses of the contract, the petitioner took possession of the machinery and equipment at site on 24.09.2004 and kept the same at its site at Ravivalasa, Srikakulam Dist. of Andhra Pradesh.

27. It is the contention of the applicant that some plant and

equipment that belongs to it and was brought on hire by the respondent on site of work has been retained by the petitioner which should be returned to it. In this regard reliance has been placed on Clause 60.7 of the contract (reproduced on internal page no.3 of the rejoinder filed by the applicant) to state that since the disputed plant and machinery was never purchased by the contractor/respondent only, applicant is the owner of the said equipment.

28. In this regard, it is submitted that neither clause 54.1 nor Clause 63.1(4) make any distinction between equipments brought on site out of mobilization advances or otherwise. A bare reading of the said clauses makes it apparent that they are applicable to all equipments temporary and material provided by the contract at the site of works, which may or may not have been bought out of the mobilization advances released by the petitioner.

29. It is argued by the petitioner that the order of this court in OMP No.342/2004 relied upon by the applicant was passed in its own facts and circumstances and it is to be noted that though the petitioner and the respondent in the said matter are same as in the present case, the contract packages and works in both cases are different, and so are the applicable contracts and the provisions thereof. Thus, the reliance placed by the applicant on the aforesaid order does not take its case any further.

30. Even if it is assumed that the equipments mentioned in the list are of the applicant, the fact of the matter is that the said equipments

were installed at the site of the project under the jurisdiction of the petitioner authority. It was the duty of the applicant to have enquired the terms and conditions governing the said installation. The failure on the part of the applicant to inform the petitioner authority about its alleged ownership and failure on the part of the applicant to take appropriate steps, he is now stopped from claiming any right on the equipment which have become the property of the petitioner authority.

31. It is further submitted that in litigation between the petitioner and the respondents in another OMP no.342 of 2004 an order dated 4th April, 2005 was passed holding that the NHAI was not entitled to the custody and possession of the machineries/equipments not purchased with its funds. The NHAI therefore had no right to retain custody of the machineries/equipments of the applicant.

32. The NHAI has illegally seized alongwith the equipments/machineries of the respondent, the equipments of the applicant which it was not entitled to do nor any such agreement was ever entered into by the applicant with it.

33. The applicant was merely working as a service provider on the site with its equipments/machineries for the respondent No.1. It had never even passed the right to use to the respondent and the equipments/machineries belonging to the applicant herein were operated by its own employees only.

34. The NHAI has the list of the equipments/machineries purchased by the respondent out of the mobilization fund advanced by

it. The disputed equipments of the present applicant were never purchased by the respondent and only the applicant is owner of those equipments and was working there as a service provider only.

35. Lastly, it is submitted that in view of an option having been given to the applicant to either approach the court or the arbitral tribunal for variation of Order dated 23.3.2006, it should have at the first instance moved the learned arbitral tribunal as the matter has already been disposed of by this court and the proceedings are at an advanced stage before the learned arbitral tribunal.

36. I hold that I.A.No. 3806/08 filed by the applicant is not maintainable and the same is liable to be dismissed on the following grounds that it is the admitted position that the present OMP No.452/05 has already been disposed of by order dated 23rd March 2006 while referring the matter to the Arbitral Tribunal with liberty to the parties to seek modification of the order, if any, by the applicant before the Arbitral Tribunal. It is not in dispute that the applicant is not a party in the OMP No.452/05 and there is no agreement whatsoever between the applicant and the petitioner herein. In view of the order dated 4th July 2007 passed in OMP No.555/07, the liberty has already been granted to the applicant to approach the court or the Arbitral Tribunal where the arbitration proceedings are going on between the petitioner and the respondent herein. It is also not in dispute that the applicant in the present application had also filed OMP No.555/07 against respondent No.1 under Section 9 of the Act seeking, inter alia, release of the

machinery allegedly belonging to the applicant and brought on the site by the contractor on hire from the applicant. The said petition filed by the present applicant was also disposed of vide order dated 4th July 2007 on the ground that since there was no arbitration clause between the applicant and the petitioner herein, therefore, the petition under section 9 of the Act was not maintainable. However, in the said order dated 4th July 2007 liberty was given to the applicant to either approach the court or the arbitrator for variation of the status quo order dated 23rd March 2006.

37. I feel that since the OMP No.452/05 had already been disposed of by order dated 23rd March, 2006 the applicant cannot take the benefit of order dated 4th July, 2007 by filing the present application before this court. The order dated 4th July 2007 is very clear that the applicant is free to approach the court or arbitrator for variation of the status quo order dated 23rd March 2006. Therefore, after having full knowledge that the present OMP has already been disposed of the only remedy left with the applicant was to approach the Arbitral Tribunal where the arbitration proceedings are pending between the petitioner and the respondent herein. Keeping this in mind, I feel that the applicant may approach the arbitrators for permission to be heard in the matter. It is made clear that this order does not preclude the applicant from taking any other steps that may have already been taken to protect its interests. However, this will, of course, be subject to any objection that may be raised by the parties to the arbitration agreement before the arbitrators.

The present application is, therefore, not maintainable and the same is dismissed.

MANMOHAN SINGH, J

JULY 01, 2009
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